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No. 94-1308

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT CHILDERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims against the government, which are based on the allegedly negligent failure of the National Park Service to post warning signs on a park trail, are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

ARA Leisure Servs., Inc. v. *United States*, 831 F.2d 193 (9th Cir. 1987)	11
Berkovitz v. *United States*, 486 U.S. 531 (1988)	5, 6
Bowman v. *United States*, 820 F.2d 1393 (4th Cir. 1987)	10
Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989)	11
Kennewick Irrigation Dist. v. *United States*, 880 F.2d 1018 (9th Cir. 1989)	11
Kiehn v. *United States*, 984 F.2d 1100 (10th Cir. 1993)	10
Seyler v. *United States*, 832 F.2d 120 (9th Cir. 1987)	11
Smith v. *United States*, 546 F.2d 872 (10th Cir. 1976)	11
Summers v. *United States*, 905 F.2d 1212 (9th Cir. 1990)	11
United States v. *Gaubert*, 499 U.S. 315 (1991)	3, 5, 6, 10
United States v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	10
Wisniewski v. *United States*, 353 U.S. 901 (1957)	11
Zumwalt v. *United States*, 928 F.2d 951 (10th Cir. 1991)	10, 11

Statutes:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	2
28 U.S.C. 2674 *et seq.*	2
28 U.S.C. 2680(a)	2, 8

Statutes—Continued: Page

16 U.S.C. 1 9
Wyo. Stat. § 34-19-105 (1990) 3

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-9a) is reported at 40 F.3d 973. The opinion of the district court (Pet. App. 23a-76a) is reported at 841 F. Supp. 1001.

JURISDICTION

The amended judgment of the court of appeals was entered on January 17, 1995. The petition for a writ of certiorari was filed on January 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 25, 1990, 11-year-old David Childers fell to his death in Yellowstone National Park in

Wyoming. At the time, he was attempting to climb a snow bank that had formed between two overlook platforms above the Yellowstone River. Petitioners are David's parents. They brought this action individually, as representatives of his estate, and as guardians ad litem for David's siblings, in the United States District Court for the District of Montana, seeking damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674 *et seq.* Pet. App. 2a, 32a-33a. They alleged that the National Park Service (Park Service or NPS) had negligently failed to post warning signs on the trail where the accident occurred. In response, the government argued, among other things, that petitioners' claims are barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).[1] See Pet. App. 3a.

[1] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, 28 U.S.C. 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

2. After a trial, the district court entered judgment for the government. Pet. App. 23a-76a. The court held that the discretionary function exception bars petitioners' claims. *Id.* at 47a-65a. It also held that, even if the exception were inapplicable, petitioners could not recover under the FTCA because the government was not liable under Wyoming law. *Id.* at 65a-76a. The court determined that no liability arose under Wyoming law because (1) the Park Service had no duty under Wyoming law to warn of the hazards posed by natural accumulations of ice and snow (*id.* at 65a-68a); (2) the Park Service used reasonable care in managing the trail where the accident occurred (*id.* at 68a-72a); (3) the Wyoming law of contributory negligence bars recovery, because David and his parents were more than 50% at fault for the accident (*id.* at 72a-75a); and (4) the Wyoming Recreational Use Statute, Wyo. Stat. § 34-19-105 (1990), bars recovery for injuries to those who, like David, enter recreational property without paying a fee (Pet. App. 75a-76a).

In holding that the discretionary function exception bars this action, the court applied the two-part test enunciated in *United States* v. *Gaubert*, 499 U.S. 315 (1991). See Pet. App. 47a-50a. The court first determined that the Park Service had discretion not to post warning signs along the trail. *Id.* at 51a-56a. The court observed that the Park Service guidelines on this subject provided only general guidance; they required "adequate[]" warnings of trail hazards and permitted such warnings to be conveyed by means other than the posting of signs, such as by maps, brochures, and personal contacts between rangers and visitors. See *id.* at 52a-56a, 69a-70a.

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agency or an employee of the Government, whether or not the discretion involved be abused.

The court subsequently determined that the Park Service had used reasonable care by providing warnings through other means. See *id.* at 68a-72a.

The court next determined that the Park Service's decision not to post signs on the trail where the accident occurred was an exercise of the type of discretion that the discretionary function exception is designed to protect. Pet. App. 56a-65a. The court found that the District Ranger had assessed the hazards of the wintertime use of unmaintained trails, including the trail where the accident occurred, and had decided, instead of closing those trails, to discourage visitors from using them. *Id.* at 37a-38a. The court further found that the Park Service decided to discourage wintertime use of the unmaintained trails, rather than posting warning signs on them, because it reasonably determined that such signs actually attracted people to trails that they would otherwise not know about and led people mistakenly to believe that the trails were maintained. *Id.* at 36a-37a, 71a. The court determined that the posting of warning signs on the trail where the accident occurred "would likely have increased the level of risk to the public." *Id.* at 71a.

3. The United States Court of Appeals for the Ninth Circuit affirmed the judgment for the government on the ground that the discretionary function exception to the FTCA bars this action. Pet. App. 1a-9a (amended opinion). It upheld the district court's determination that the Park Service's "decisions concerning warnings, trail maintenance, and trail closure" were discretionary. *Id.* at 7a-8a. The court of appeals explained that the guidelines on which petitioners relied "mandate that the public be 'adequately warned'"; but "decisions *as to the precise manner* in which NPS would warn the public as to trails which are left open, but unmaintained in the

winter[,]" are discretionary. *Id.* at 9a. The court also determined that the type of discretion underlying those decisions "was precisely the kind the discretionary function exception was intended to immunize from suit." *Ibid.* Park rangers were required "to balance, within the constraints of the resources available to them, a statutory mandate to provide access with the goal of public safety." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 12-22) that the court of appeals erred in holding that the discretionary function exception to the FTCA bars this action. That holding, however, reflects a straightforward analysis of the facts of this case under the well-established test for applying the exception. Moreover, the decision below is consistent with decisions of other courts of appeals involving similar facts.[2]

1. "The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As this Court explained in *Gaubert*, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.' " 499 U.S. at 322, (quoting *Berkovitz*, 486 U.S. at 536). "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary

[2] Petitioners assert that the government's motion asking the Ninth Circuit to publish the decision below establishes that the decision is "important 'national precedent.' " Pet. 20; see also Pet. App. 21a-22a (reproducing government motion). Although the decision below was sufficiently important to be published, it does not warrant review by this Court, for reasons discussed *infra*.

function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536).[3]

a. The court of appeals first determined that the conduct on which petitioners' claims are based is discretionary. Pet. App. 3a-9a. In challenging that determination, petitioners rely primarily on two provisions—one is in the Park Service Trails Management Handbook; the other is in the Government Sign Manual—that they claim required the posting of signs on the trail where the accident occurred. See Pet. 9-11, 17-18; see also Pet. App. 39a. The courts below, however, reasonably interpreted those provisions not to impose such a requirement.

The provision in the Trails Management Handbook on which petitioners rely states (Pet. 17-18):

> Trails should be adequately marked to warn visitors of safety hazards, to inform visitors of limitations and restrictions, and to guide visitors along the trail.

This provision cannot reasonably be read to require a sign indicating every safety hazard that one might encounter on any trail in the national park system. Such a reading would be inconsistent with another agency guideline, the NPS-50-Loss Control Management Guideline (NPS-50), that gives the Park Service discretion to

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[3] Petitioners assert (Pet. 15) that further review is warranted because this Court has not recently addressed the discretionary function exception "outside of the regulatory context." Petitioners do not, however, contend that the discretionary function analysis differs depending on whether a case falls inside or outside of "the regulatory context." Nor do they explain why this case falls outside "the regulatory context," despite the existence of (and petitioners' reliance upon) regulatory guidelines addressing warnings of safety hazards in national parks.

warn the public of safety hazards by means other than the posting of signs. Pet. App. 39a, 41a. As the district court found, NPS-50 "states that park brochures are a primary means of providing warnings," and that other means include "interpretative program messages, bulletin board information and visitor center displays." *Id.* at 41a.

The other provision on which petitioners rely states (Pet. 18):

> If the government cannot remedy a hazardous condition, it must protect the public through signing, fencing, or by otherwise making an 'honest disclosure' of the danger so the visitor can make an intelligent risk assessment. . . . Warnings must be in the proximity of the danger.

Petitioners seize on the last part of this provision, requiring warnings to be "in the proximity of the danger," to suggest that warnings can be provided only by nearby signs. See Pet. 11, 18. But read as a whole, the provision gives the Park Service discretion to advise of warnings not only "through signing," but also through "fencing" or "otherwise." The provision is thus consistent with the other provisions that afford such discretion.

The Park Service made an "honest disclosure" of the safety risks posed by the trail where the accident occurred, and did so in reasonable proximity to the trail. The trail was located in the Canyon subdistrict of the Park. Pet. App. 24a. Warnings about the wintertime use of unmaintained trails were provided in brochures available at the entrance to the subdistrict and at the Canyon Warming Hut. *Id.* at 26a. In addition, rangers stationed at the Warming Hut directed visitors to the maintained trails and discouraged them from using the

unmaintained trails. *Id.* at 25a-26a. The "Yellowstone Winter Guide," also available at the Warming Hut, recommended that visitors "[s]tay on boardwalks or maintained trails." *Id.* at 27a. Furthermore, a trailhead identification sign in the Canyon subdistrict read "Winter visitation—Caution, Hazardous Footing." *Id.* at 27a-28a. By using these means to warn visitors of safety hazards, the Park Service complied with the guidelines.[4]

b. The court of appeals held that the discretion underlying the Park Service's decision not to post signs on the trail where the accident occurred was "precisely the kind the discretionary function exception was intended to immunize from suit." Pet. App. 9a. The decision was based on "balanc[ing], within the constraints of the resources available to them, [the] statutory mandate to provide access with the goal of public safety." *Ibid.*

Petitioners argue that the Park Service's failure to post signs on the trail was merely the product of unthinking inaction. Pet. 17, 21. In support of that argument, they cite the fact that the trail was temporarily closed but later reopened. Pet. 21. On the contrary, the findings by the district court concerning the temporary closing of the trail show that the Park Service's decision not to post signs was a considered exercise of discretion.

The district court found that Park Service officials took into account the dangers posed by wintertime use of

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[4] Petitioners suggest (Pet. 18-19) that the Park Service abused its discretion because signs are the most effective means of providing warnings. But the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

the trail and determined that they did not justify closing it. In late October, 1989, a subdistrict ranger posted a sign closing the trail and recommended to the District Ranger that it be closed for the winter. Pet. App. 37a. The District Ranger, however, decided against closing the trail. "Based upon his 12 years in the area, and the approximately 20 times he had hiked down the trail in the winter, [the District Ranger] believed that the trail did not pose a greater safety risk to the public than any of the other unmaintained trails in the Park." *Ibid.* "Since the trail did not typically have risks greater than many other unmaintained trails * * *, he did not believe that it was appropriate to order its closure," since logic would dictate that many other unmaintained trails would also have to be closed. *Id.* at 38a. The District Ranger determined that the closure of so many trails would be inconsistent with his duty under 16 U.S.C. 1 "to make as much of the Park accessible to the public as possible." Pet. App. 38a.

The district court further found that the Park Service determined that it was better to discourage wintertime use of the trail than to post warning signs on the trail. Pet. App. 38a. In particular, the district court found (*id.* at 36a-37a):

> The Park Service did not place signs warning of winter hazards along unmaintained trails generally, and the Trail [where the accident occurred] specifically, for the following reasons: (1) it is impractical to do so in an area as large as Yellowstone; (2) the presence of such signs would unnecessarily attract visitors to trails which they might otherwise not know about; and (3) the presence of such signs indicates to the public that the Park Service has inspected and maintains these trails. Because the

> Park Service cannot inspect all unmaintained winter trails which are used by the public and present dangers, the use of such signs would be inappropriate.

The court also found that the District Ranger "discourage[d] use [of the trail] by removing trailhead identification signs and not listing it on winter maps." *Id.* at 57a.

Thus, the Park Service decision that petitioners challenge reflected "a balancing of public policy objectives, such as resource allocation, visitor safety and visitor access." Pet. App. 57a. It was therefore protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 323 (purpose of the exception "is to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort' ") (quoting *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).[5]

2. The decision below is consistent with decisions of other courts of appeals involving recreational accidents on federal land. See, *e.g.*, *Kiehn* v. *United States*, 984 F.2d 1100 (10th Cir. 1993); *Zumwalt* v. *United States*, 928 F.2d 951, 955 (10th Cir. 1991); *Bowman* v. *United States*, 820 F.2d 1393, 1395 (4th Cir. 1987).

Petitioners contend (Pet. 12) that other lower courts have held that the failure to post warning signs in

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[5] Even if the Park Service's decision not to post warning signs were not protected by the discretionary function exception, further review would be unwarranted because, as the district court held in rulings that the Ninth Circuit did not disturb, the Park Service's decision provided no basis for liability under Wyoming law. See Pet. App. 65a-76a.

national parks is not protected by the discretionary function exception. The decisions cited by petitioners, all of which predate *Gaubert*, are inapposite. In each of those decisions, the court found no evidence that the failure to post signs was based on an exercise of discretion of the sort protected by the exception. See *Summers* v. *United States*, 905 F.2d 1212, 1215 (9th Cir. 1990); *Boyd* v. *United States*, 881 F.2d 895, 898 (10th Cir. 1989); *Seyler* v. *United States*, 832 F.2d 120, 122-123 (9th Cir. 1987); *Smith* v. *United States*, 546 F.2d 872, 876-877 (10th Cir. 1976). Here, in contrast, the courts did find such evidence. See Pet. App. 8a (distinguishing *Summers*, *Boyd*, and *Smith*); see also *Zumwalt*, 928 F.2d at 955 (*Smith* and *Boyd* do not support the argument that "*any* failure to warn [by the Park Service] falls outside the scope of the discretionary function exception").

Petitioners also suggest (Pet. 12-13) that the decision below conflicts with previous Ninth Circuit decisions. Any such conflict is for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no such conflict. In *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018 (9th Cir. 1989), the court stated that the discretionary function exception does not protect decisions that violate "safety standards in the form of specific and mandatory regulations or policy." *Id.* at 1027. In *ARA Leisure Servs., Inc.* v. *United States*, 831 F.2d 193, 195-196 (9th Cir. 1987), the court stated that the violation of a safety standard would not be protected by the exception merely because it was the result of budget constraints. *Kennewick Irrigation Dist.* and *ARA Leisure* are inapposite, because the Park Service's decision not to post warning signs on the trail where the accident in this case occurred did not violate any safety standard and was not based merely on budget constraints.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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